

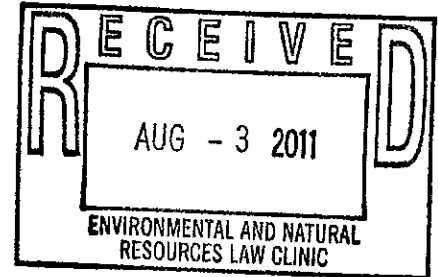


United States Department of the Interior

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

Appalachian Region
Three Parkway Center
Pittsburgh, Pennsylvania 15220

AUG 01 2011



CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Ms. Teresa B. Clemmer, Acting Director
Ms. Lisa Widawsky, Attorney
Environmental and Natural Resources Law Clinic
Vermont Law School
164 Chelsea Street
South Royalton, Vermont 05068-0096

Dear Ms. Clemmer and Ms. Widawsky,

I have received your May 9, 2011, letter requesting an informal review of a decision by the Office of Surface Mining Reclamation and Enforcement's (OSM) Pittsburgh Field Division (PFD) regarding your clients', Residents Against the Power Plant (RAPP) and the Environmental Integrity Project (EIP), citizen's complaint. Your clients complained that the drainage from the Champion Processing Coal Refuse Disposal Area (Champion) in Washington County, Pennsylvania is not being properly collected nor treated prior to leaving the permit; that groundwater and surface waters are being polluted; and that fugitive dust has affected areas off the permit.

On receipt of your clients' complaint, the PFD issued Ten Day Notice (TDN) X10-121-019-008, TV 3 to the Pennsylvania Department of Environmental Protection (PADEP). After evaluating the PADEP's response to the TDN, the PFD determined that the response was not arbitrary, capricious, or an abuse of discretion and determined that no further action was warranted with regard to the complaint. You have requested an informal review of the PFD's decision not to conduct an inspection or take an enforcement action. An informal review is a review of file materials associated with a complaint. The review is to determine if there is sufficient reason to believe that a violation of the approved Pennsylvania program exists and whether the PADEP has been notified of all alleged violations in a TDN. If violations exist that have not been addressed by the PADEP within the bounds of its approved program, the PFD will be required to take the appropriate action, pursuant to the Federal regulations at 30 CFR 842.11, to cause the violations to be corrected. Federal regulations provide, among other things, that before I can require the PFD to conduct a Federal inspection, I must find that the PADEP's response to the TDN was arbitrary, capricious, or an abuse of discretion. Without such a finding, I cannot require a Federal inspection.

With the above background and procedures in mind, I will now respond to your informal review request. After a review of the record, the facts of the case, as I understand them, are as follows:

On April 27, 2010, you requested, on behalf of EIP and RAPP, that the PADEP inspect Champion's coal refuse disposal area known as the Beech Hollow Facility (Facility). You stated that there was "reason to believe" that the Facility, owned and operated by Champion, was in violation of its permit and/or the PADEP's regulations. Within your April 27th letter, you stated that Champion had continuously violated its permit, evidenced by manganese and pH discharge violations, repeated unpermitted discharges and effluent limit violations from outfall 001. You conclude that this led to contamination of waters of the Commonwealth through unpermitted discharges. You also stated that Champion's permit requires them to obtain written consent before making any modifications to its dam and this requirement was allegedly violated once Champion had installed a new sump before obtaining the necessary authorization to do so. You further conclude that since Champion has shown signs of non-compliance that there is "reason to believe" that Champion has failed to maintain the other six settling ponds resulting in contamination of other areas of operation.

On June 14, 2010, you participated in an inspection of the site with the PADEP. Information in the record regarding that inspection is derived from your May 9, 2011, letter to me requesting an informal review. In the May 9th letter you indicated that during the inspection, the PADEP did not take any water samples and did not inspect the entire facility. You observed discharges off the permit and loose piles of fly ash blowing around the site. You also observed the Beaver Pond and characterized water within the pond as having an unnaturally blue color.

On October 27, 2010, you wrote a letter to the PADEP and requested a supplemental inspection of the Facility because you believed that Champion continues to not be in compliance with the approved Pennsylvania program. You stated that a Compliance Order (CO) (Docket No. 101017) was issued on May 18, 2010, which required Champion to provide a permanent abatement plan to treat all discharges and ensure that any discharges from the site were within the effluent standards pursuant to the Pennsylvania Code. However, you stated that this plan was insufficient because of the document's short length and believed Champion intended to convert ongoing seepage violations into new outfall locations.

You have indicated that the potential areas of interest are Duck Pond Dam Area, Beaver Pond, Pond 980, Pond 1, Pond 1A, Pond 2, Pond 3, Pond 4, Pond 5, and the Fly Ash Disposal Area. You allege that surface drainage is ineffectively being carried to the acid mine drainage collection system, to Pond 6, or Outfall 001, resulting in habitual violations at Duck Pond Dam and that Champion has failed to address this issue in its abatement plan. You discuss that even though Champion had dug a trench to collect surface drainage, you found runoff which had not been captured by the trench upon inspection. Thus, you believe that these alleged violations will continue to occur.

You also noted that the Beaver Pond was not mentioned in Champion's abatement plan and seemed "unnaturally blue." You noted that a PADEP inspector determined that water in the Beaver Pond, located near Route 22, originated from the Facility and that the discharge was flowing offsite into a tributary of Little Raccoon Run. You allege that the existence of violations of the water quality standards in the Beaver Pond shows that acid mine drainage flows offsite.

You stated that because Champion intended to designate four ponds as new outfalls, it demonstrates that Champion had no intentions of abating the current issues, giving you a “reason to believe” ongoing violations were occurring onsite. The four ponds included Pond 980, Pond 2, Pond 4, and Pond 1. During your inspection of Pond 980, you stated that the PADEP inspector found the two sediment collection ponds included in Champion’s abatement plan were almost filled to capacity. You also noted that water was streaming away from the bottom of the berm into an unnamed tributary (Little Raccoon Run). Upon inspection, you stated that there was orange discharge flowing from Pond 2 into nearby vegetation. Although Champion had installed a collection pond and laid pipe in order for the water to flow from Pond 4 to Pond 6, you found an area of moisture around the berm. For these reasons you believe that Champion has ongoing violations at each site. At Pond 1, Champion repaired a leaky pipe and mentioned in its abatement plan that it would construct a sediment trap if the repair failed to stop the seepage. You stated that full repair could not be determined at that point in time. Thus, you deemed a supplemental site inspection necessary to observe whether Champion was still required to construct a sediment trap.

At Pond 5, you found an unconnected overflow pipe during your June inspection, which led you to believe that during a rain event, the water level could rise and potentially overflow, releasing excess mine drainage.

According to your letter, you were unable to inspect Pond 1A because the PADEP stated this location was difficult to reach and far in distance. One of the PADEP inspectors also mentioned that this site had not been inspected for four or five years and this concerned you because of its position near the permit boundary line and its proximity to nearby homes. You were also unable to inspect Pond 3 because the PADEP allegedly discouraged an inspection of this area, causing you to make an inference that this site is also in violation. You indicated similar circumstances while attempting to inspect the portions of the permit containing fly ash, where it appeared that Champion had made little efforts to control loose fly ash particles.

On November 15, 2010, the PADEP responded to your letter requesting a supplemental site inspection. The PADEP made a preliminary assessment and determined that you submitted insufficient evidence to show there was “reason to believe” that ongoing violations of the Clean Streams Law (CSL) or Coal Refuse Disposal Act (CRDA) were occurring. The PADEP indicated that the scope of inspection is governed by and within the PADEP’s discretion under CSL and CRDA. In response to the unconnected pipe at Pond 5, the PADEP stated that the pipe maintains the water level and only air, not water, is discharged by the pipe.

After reviewing your letter and the water samples provided for Beaver Pond, the PADEP stated that the term “Water Quality Standards” was misunderstood. It stated that the criteria set forth are not effluent limitations, which are used to determine an existing violation under the CSL. The PADEP determined an existence of a “one time level” of manganese at 6.9 mg/L was not sufficient to establish a violation at Beaver Pond and the material you believed to be fly ash was RecMix used for liming and as a buffer agent to neutralize acid mine discharge. The PADEP also stated that you had not provided a factual basis to infer that Pond 1A had any violations.

On December 3, 2010, you responded to the PADEP's denial for a supplemental inspection, disagreeing with its decision. You claimed that the PADEP inspector's finding that Champion was in compliance was unconvincing and Champion's modification and renewal of its permit demonstrated that it was aware of its inability to comply with its existing permit. Based on the information you had previously submitted to the PADEP, you discussed that you still had "reason to believe" violations were occurring at the Facility due to a prior PADEP inspector's comment concerning Pond 1A along with the supplemental samples serving as evidence of potential environmental and health threats. You also notified the PADEP that you had contacted the OSM about this situation.

You also sent a letter to the Director of the OSM, to the PFD and to me on December 3, 2010, requesting a Federal inspection from the OSM, stating that the PADEP had failed to adequately assess the conditions at the Facility and ensure compliance. You requested that the OSM conduct a Federal inspection without prior notice to Champion or any of its agents.

On December 14, 2010, the PADEP responded to your request stating that citizen inspections occur when information is presented which gives the PADEP "reason to believe" a violation is or has occurred. However, a supplemental site inspection of the Facility was granted where you and your clients were given a right to accompany inspectors. The PADEP placed a limit on the scope of the inspection, where it only allowed inspection over the areas in the June 2010 inspection with the addition of Pond 1A. The PADEP also noted in its response that according to Pennsylvania and OSM regulations, prior notice of citizen inspections are within the scope of the regulations and also serve as common courtesy.

On December 22, 2010, the OSM's Johnstown Area Office (JAO) issued TDN X10-121-019-008, TV 3 for three alleged violations. Violation No. 1 involved various discharges onsite which failed to pass through treatment facilities to reach Pond 6 and Outfall 001, violating 25 Pa. Code 90.107. Violation No. 2 involved an alleged violation of 25 Pa. Code 90.102, where you alleged that water which failed to meet effluent standards was being discharged offsite. Violation No. 3 involved an alleged violation of 25 Pa. Code 90.101, where you inferred that Pond 1A was also contaminated since it had not been inspected for a number of years. On the same day, the OSM notified you in writing of the issued TDN and explained the TDN process.

On January 5, 2011, you sent the PADEP a letter objecting to implementation of site inspection limitations along with giving Champion prior notice of inspection. You also responded to the PFD on January 5th, intending to amend your original citizen's complaint with additional information regarding the PADEP's alleged procedural deficiencies along with sampling data Champion provided to the PADEP showing contamination levels. You claimed procedural deficiencies were due to inadequate enforcement and inappropriate restrictions on citizen participation during inspections. You urged the OSM to take corrective actions and conduct a Federal inspection at the Facility without giving any prior notice to Champion.

Also on January 5, 2011, you sent the JAO a letter requesting to supplement your initial citizen complaint with three items: a copy of a December 14, 2010, letter from the PADEP demonstrating procedural deficiencies; a copy of a January 5, 2011, letter from you to the PADEP; and sampling data provided by Champion showing alleged contamination of ground

and surface water. In a table within the letter you noted violation of water quality standards from aluminum, manganese, pH, suspended solids, iron, and cobalt on various dates at eight different monitoring wells and water sampling points.

On January 14, 2011, the PADEP sent a letter to the JAO, responding to the TDN. The PADEP stated that under Violation No. 1 the Beaver Pond is not included in the permit area and also discussed Champion's onsite attempts to comply with its abatement plan. Both Violation No. 1 and No. 2 responses stated that the PADEP was awaiting sampling results to determine compliance. In response to Violation No. 3, Pond 1A was dewatered and runoff was contained and treated by passing it through Pond 6.

On January 27, 2011, the PADEP issued two COs. The first CO (Docket No. 111002) was issued for discharging water that exceeded the required 2.75 mg/L manganese concentration under the permit. The second CO (Docket No. 111003) was issued for failure to comply with the Order (Docket No. 101017) issued on May 18, 2010, which ordered Champion to ensure that all discharges flowing from the coal refuse disposal area meet effluent limitations. These COs were included in the PADEP's January 28th letter to the JAO in regards to their inspection.

The PFD responded to you on February 25, 2011, explaining the rationale for its response to each of the three violations issued in the TDN. The PFD determined that the PADEP's response to Violations No. 1, No. 2, and No. 3 showed good cause pursuant to 30 CFR 842.11(b)(1)(ii)(B)(4). It was also determined that the PADEP's issuance of COs demonstrated that the PADEP took action to comply with governing laws and intended to correct the Facility's violations. The letter also further explained that citizen's inspections are governed by 30 CFR 842.12 and implemented by the Commonwealth of Pennsylvania through 25 Pa. Code 86.215. Under these provisions, there is no mandate to conduct a citizen inspection absent prior notice to the permittee. Therefore, the PFD denied further inspection.

On March 16, 2011, a JAO inspector conducted a follow-up inspection of the Facility. The results of the inspection were detailed in an inspection report dated March 22, 2011. The inspector noted in the report that the inspection was performed to examine the progress of violation abatement. The inspector further noted that all water on the permit is either pumped directly to, or gravity drains to, Pond 6 which discharges to Outfall 001. Outfall 001 is currently the only discharge point on site authorized by the NPDES permit. However, three additional outfall points are proposed to be added to the NPDES permit.

The inspector examined the ponds on the site and noted the following:

Pond 1A: The discharge from the pond is controlled with a manual valve that the operator opens daily allowing the water to gravity drain to the "yellow boy" pond located above Pond 2. The water in turn flows to Pond 2.

Pond 1: A dike was constructed and a pump added to avoid sheet flow from the discharge of this pond. This pump goes directly to Pond 6.

Pond 2: This water is pumped directly to Pond 6.

Pond 4: This pond is located along Route 980. A sump catches runoff from several seeps along the edge of the permit and pumps this water to this pond which flows to Pond 5 and eventually to Pond 6.

Pond 5: Ponds 3 and 4 are pumped here. Discharges from this pond go to Pond 6.

Pond 6: All water captured on this permit is either pumped to this pond or gravity drains to it. It is currently being treated with hydrated lime. A discharge of approximately 1,000 gallons per minute flows into an unnamed tributary of Little Raccoon Creek.

980 Sumps: There is now a series of sumps located along Route 980 that are pumped to Pond 3, then to Pond 5, then finally to Pond 6.

Duck Sump: This pond collects discharges from the Beaver Pond that is located off permit. The water is then pumped to Pond 1A and ultimately reaches Pond 6. A permit revision under review proposes to extend the collection ditch to this pond in order to capture several seeps for treatment.

Beaver Pond: This pond is not located on the permit. Without a hydrologic assessment it cannot be determined if the alleged violations associated with this pond can be attributed to the subject permit. However discharges from this pond reach the permit and are treated at the Duck Sump which is within 50 feet of this pond.

The inspector noted that all of the ponds were certified and that the annual certifications were current. The inspector further noted that the bond of \$1.4 million appeared not to be sufficient to cover the cost of full reclamation of the site. However, the inspector did not provide data in support of this assertion. Therefore, I am directing the PFD to conduct an additional analysis with respect to the inspector's assertion and to take appropriate action.

On May 9, 2011, you requested an informal review of the PFD's February 25th determination with regard to the TDN. In your request for an informal review, you stated that the OSM should reverse its denial of a Federal inspection. Your rationale for this motion is as follows. First, you claim that the PFD failed to address all alleged violations including those not listed in the TDN issued on December 22, 2010, resulting in a misinterpretation of your request by citing only three violations. Second, you allege there is significant, imminent environmental harm present due to acid mine drainage flowing to Beaver Pond, an unpermitted pond. Third, you claim that PADEP's response to the TDN was arbitrary, capricious and an abuse of discretion. Thus, you are requesting an informal review in order to obtain a Federal inspection on the alleged violations that were not included in the TDN due to the State's alleged failure to take appropriate action in response to the TDN, along with an inspection of the Beaver Pond.

Moreover, you claim that the PFD failed to cite violations involving ground and surface water pollution. In your request for an informal review, you stated Champion was in violation of 25 Pa. Code sections 90.101(a), 90.101(b), and 90.102(e)(4). However, you stated that your initial

list of alleged violations was not exhaustive and your additional alleged violations were not included in the December 22, 2010, TDN.

You stated that the PADEP response to the TDN was arbitrary, capricious and an abuse of discretion for four reasons. First, you claim that the PADEP's response was an abuse of discretion because it failed to respond to the contamination at Beaver Pond. Second, you allege that the PADEP's decision to lift the January 2011, CO was an abuse of discretion because it failed to verify whether the Facility was actually in compliance. Third, you allege that the PADEP's decision to also lift the May 2010, CO was an abuse of discretion because you claim the Facility had failed to comply with the Order. Fourth, you allege that PADEP failed to take appropriate action by designating Facility seeps which were in violation into permitted outfalls. For the reasons stated above, this leads you to conclude that an informal review is necessary because the violations at the Facility have been inadequately addressed.

In your request for informal review, you have made allegations regarding improper termination and vacation by the PADEP of its enforcement actions and deficiencies in the PADEP's implementation of its program regarding citizen's complaints. Your concerns with the PADEP's implementation of its program are beyond the scope of this informal review. The informal review process is provided for citizens to request a review of a decision by an authorized representative of the OSM not to inspect or take enforcement action with regard to alleged violations (see 30 CFR 842.15). The informal review is not a vehicle for a review of a State's implementation of its program. Thus, I will not discuss your allegations with regard to the PADEP's implementation of its program with regard to allowing citizens' access to a mine site or control of citizen's activities while on a mine site and whether the PADEP had sufficient justification to terminate or vacate violations occurring prior to your citizen complaint filing with the PFD. However, the PFD will consider the information you provided in its annual evaluations of the PADEP's implementation of its approved program.

In this informal review decision, I will focus on the three alleged violations of the TDN and an allegation regarding fugitive dust that was not addressed through the TDN process.

Violation No. 1 of the TDN concerned various discharges and seeps that are not properly passed through settling and treatment facilities. In your original, December 3, 2010, complaint to the PFD you noted that there were many containment issues where Champion failed to convey all drainage to treatment ponds. You noted that seeps were observed around many of the settlement ponds and discharges were flowing near waters of the Commonwealth.

The record shows that the PADEP did take action to cause violations to be corrected. Subsequent to your December 3rd complaint, the PADEP issued CO 101017 on May 18, 2010, for failure to design, construct and maintain treatment facilities capable of collecting and conveying all discharges from the area to a treatment facility. Although the PADEP issued Failure to Abate Compliance Order (FTACO) 111003 on January 27, 2011, for failure to comply with the provisions of CO 101017, the FTACO was vacated by the PADEP on March 10, 2011, because its inspector failed to terminate the CO when Champion satisfactorily complied with the provisions of the CO. The PADEP's response to the TDN regarding this violation, as noted in its

letter to the JAO of January 14, 2011, indicates that all discharges are collected, and/or pumped through a treatment system.

However, the record shows that the PADEP did not take your allegations regarding the water in the Beaver Pond into account in its response to the TDN. You made the allegations regarding water quality in the pond in your April 27, 2010, letter to the PADEP and your December 3, 2010, complaint letter to the PFD. While the Beaver Pond was not specifically mentioned in the TDN, it was made clear in the JAO's inspection report of December 22, 2010, explaining the allegations making up the TDN, that violation one of the TDN included your specific concerns of water quality in the pond.

While the record shows that the Beaver Pond is in proximity to Champion's permit, there appears to be some discrepancy in the record as to whether drainage from Champion's permit is affecting the pond. You noted in your letter of October 27, 2010, that the PADEP inspector confirmed that water in the pond "originated at the Champion site." However, JAO's inspector indicated in the March 22, 2011, inspection report, "[w]ithout a hydrologic assessment it cannot be determined if the alleged violations associated with this pond can be attributed to the subject permit." In any case, the record shows that the PADEP did not conduct a hydrologic assessment nor did it provide good cause for failing to take an enforcement action regarding the water in the pond.

While I find that the PADEP did take action to cause violations regarding most of the seeps to be corrected, I find that by not investigating allegations that discharges from Champion's permit affected the Beaver Pond, it did not address all alleged violations. Therefore, I find that the PADEP's response to violation one of the TDN, as it relates to the Beaver Pond, is arbitrary, capricious or an abuse of discretion. As a result, I am reversing the PFD's determination with regard to Violation No. 1 of the TDN and requiring the PFD to conduct a Federal inspection to determine if the water in the Beaver Pond is a violation of the approved Pennsylvania program caused by Champion's coal mining activities. If so, the PFD will be authorized to take enforcement action to cause the violation to be corrected. The PFD will notify you of its impending Federal inspection with regards to this alleged violation. You will be offered the opportunity to accompany the inspector during the inspection. However, please note that in this instance, the OSM's inspection authority only extends to those areas where we have determined that Pennsylvania's actions in response to a violation are arbitrary, capricious, or an abuse of discretion. Therefore, the inspection will be limited only to that area of the permit, if any, that the inspector determines is necessary to investigate your allegation regarding any connection between Champion's permit and the Beaver Pond. No other portion of the permit will be available for your inspection during the Federal inspection.

In your request for informal review you indicated that rather than informing the PADEP of your allegations regarding the Beaver Pond through a TDN, the OSM should have conducted an immediate Federal inspection because the alleged violations at the Beaver Pond constitute a significant, imminent environmental harm. You based your contention on the fact that the pond is not on Champion's permit and that the pollutants in the pond water indicate that a significant, imminent environmental harm is occurring. The PFD noted in its February 25, 2011, letter to you that an imminent harm situation does not apply in this instance.

I agree with the PFD's determination with regard to imminent harm. Without knowing if there is a hydrologic connection between Champion's permit and the Beaver Pond, there is insufficient reason to believe that Champion is conducting coal mining operations without a valid surface coal mining permit. Therefore, the provisions of 30 CFR 843.11(a)(2) that require issuance of an imminent harm cessation order for off-permit operations do not apply. You further argued that the presence of pollutants in the water requires issuance of an imminent harm order. However, as the JAO inspection report of March 22, 2011, indicates, the discharge from the Beaver Pond flows on to Champion's permit and is treated at the Duck Sump, which is located about 50 feet from this pond. The record shows no evidence that the discharge is affecting surface or ground waters. Therefore, there is no evidence to support a finding that a significant, imminent environmental harm is occurring.

Violation No. 2 of the TDN was issued for allegations regarding discharges from the permit that do not meet effluent limitations. In its January 14, 2011, response to the TDN, the PADEP indicated that it was awaiting water sampling results taken from the discharges before determining whether a violation exists. In a January 28, 2011, letter to the JAO, the PADEP indicated that it issued CO 111002 on January 27, 2011, with three violations. Each of the violations was for water samples which did not meet effluent limits.

The JAO conducted an inspection of the site on March 16, 2011, to ascertain the status of Champion's efforts to abate the violations. The inspector noted in her inspection report of March 22, 2011, that all water on the permit is either pumped directly to, or gravity drains to, Pond 6 which discharges to Outfall 001. The inspector did not note in the report that drainage was escaping from the permit without being collected and treated before being discharged from the permit. Therefore, the record indicates that the violations that existed regarding untreated discharges from the permit were the subject of enforcement actions that resulted in compliance with the Pennsylvania approved program. The Federal regulations at 30 CFR 842.11 provide that when a State takes enforcement action authorized by the approved State program to cause a violation to be corrected, its response to a TDN is not arbitrary, capricious, or an abuse of discretion. The record shows that the PADEP has taken action to cause the violations to be corrected (issuance of COs for violations of effluent limitations). The COs resulted in Champion's compliance with the approved Pennsylvania program. Therefore, PADEP's response to the TDN was not arbitrary, capricious or an abuse of discretion and, as a result, I have no authority to order a Federal inspection. Thus, I am affirming the PFD's determination with regard to violation two of the TDN.

Violation No. 3 of the TDN was issued for contamination of surface and drinking water. In your December 3, 2010, complaint you indicated concern that the proximity of the discharge of Pond 1A to the permit boundary could affect water supplies. In your January 5, 2011, letter to JAO, you provided summaries of water quality results, some of which were from monitoring wells, that apparently lead you to believe that groundwater pollution is occurring. Additionally, you noted in your May 9, 2011, request for informal review that data from groundwater monitoring points, which indicates that water quality criteria and standards were being exceeded, is indicative of groundwater pollution. Your allegation of possible groundwater contamination, with regard to the discharge of Pond 1A, was the basis for this violation of the TDN.

In its January 14, 2011, response to the TDN, the PADEP indicated that Pond 1A is being dewatered and that all runoff from the pond area is contained within the permit area and passes through Pond 6 for treatment. The PFD found this response was not arbitrary, capricious, or an abuse of discretion because no violation existed (pending the results of water sampling).

While the record contains no evidence that water supplies were affected by discharges from the permit, there is no indication that the PADEP conducted an investigation into whether supplies were affected. The PADEP dismissed your contention of groundwater pollution by stating that all surface drainage in the area of Pond 1A was being collected. However, the record shows no attempt to determine whether the previous discharges from the area affected groundwater supplies.

Additionally, the supplemental information regarding ground and surface water monitoring results you provided to the JAO in your January 5, 2011, letter was apparently dismissed without further investigation. In its February 25, 2011, letter to you, the PFD indicated that the monitoring data did not give it reason to believe a violation of permit water effluent quality requirements exists. The PFD based this determination on the fact that the sections of the Pennsylvania code you cited as not being in compliance do not apply to the water quality monitoring data you provided. While the PFD's reasoning may be sufficient basis for not citing an enforcement action, it does not provide a rationale for failing to notify the PADEP of your concerns of groundwater pollution. The Federal regulations at 30 CFR 842.11 provide that an authorized representative has reason to believe a violation is occurring if the facts alleged by the informant would, if true, constitute a violation. If the groundwater sampling results you provided do indicate that groundwater pollution is occurring, a violation of the approved Pennsylvania program would exist and the PFD is obligated to inform the PADEP of the allegation via a TDN.

With regard to Violation No. 3 of the TDN, the PADEP should have conducted an investigation into your allegation of water supplies being affected by the discharge from Pond 1A. Without conducting an investigation, the PADEP did not know whether a violation is occurring and as a result did not have good cause for failing to take an enforcement action. As a result, I find that the PADEP's response to Violation No. 3 was arbitrary, capricious or an abuse of discretion. Accordingly, I am reversing the PFD's determination regarding Violation No. 3 of the TDN and ordering a Federal inspection of the water supplies you allege have been contaminated by drainage from Pond 1A. In addition, I am requiring the PFD to inform the PADEP of your concerns regarding groundwater pollution, as you have alleged in your January 5, 2011, letter, through the TDN process.

The PFD will notify you of its impending Federal inspection with regards to Violation No. 3 of the TDN. You will be offered the opportunity to accompany the inspector during the inspection. However, please note that the inspection will be limited only to that area of the permit, if any, that the inspector determines is necessary to investigate your allegation regarding Pond 1A and its effect on water supplies. No other portion of the permit will be available for your inspection during the Federal inspection.

Finally, I will address your complaint regarding fugitive dust. In your October 27, 2010, letter to the PADEP, you noted that Champion has made little to no effort to control fugitive fly ash. In your May 9, 2011, request for informal review, you noted that coal ash was blown off-site. The record provides a discrepancy of whether coal ash is present on site. The PADEP contends that the material you observed is not coal ash, but you refute that contention noting that a PADEP inspection report refers to the presence of coal ash. However, the presence or absence of coal ash is not relevant to potential violations regarding fugitive dust. The approved Pennsylvania program at 25 Pa. Code 90.149 provides control measures for air resources protection including fugitive dust regardless of the makeup of the dust. The PFD did not advise the PADEP of your allegations regarding fugitive dust, thus preventing the PADEP the ability to respond to your allegations. The Federal regulations at 30 CFR 842.11 require that an authorized representative provide notification of alleged non imminent harm violations to the State regulatory authority for action. Accordingly, I am requiring the PFD to issue a TDN to the PADEP regarding this allegation. The PFD will apprise you of the PADEP's response to this allegation.

If you do not agree with this decision, you have the right under 43 CFR 4.1280 et seq. to appeal to the Office of Hearings and Appeals. If you wish to appeal this decision, your written notice of appeal must be filed within 20 days from receipt of this decision at the following address:

U.S. Department of the Interior
Office of Surface Mining Reclamation and Enforcement
Attn: James M. Taitt, Chief
State and Federal Programs Branch
3 Parkway Center
Pittsburgh, Pennsylvania 15220
Telephone number 412-937-2106

In addition, you must send a copy of your notice of appeal to the following two addresses:

Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy Street, Suite 300
Arlington, Virginia 22203
Telephone number 703-235-3800

AND

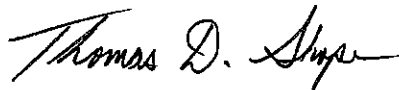
U.S. Department of the Interior
Office of the Solicitor
Attn: Steven Barclay
3 Parkway Center, Suite 385
Pittsburgh, Pennsylvania 15220
Telephone number 412-937-4007

Your notice of appeal must include your appeal identification number which is 11-07-Clemmer. As part of your appeal, you are required to file a statement of reasons for the appeal. If a

statement of reasons is not included in the notice of appeal, it must be submitted within 20 days after the filing of the notice of appeal.

Should you appeal, please be aware of your obligations, under 43 CFR 4.1109(a)(1) and 4.1105(a)(5) to also notify other parties and your obligation under 43 CFR 4.1283 to serve personally or by certified mail, return receipt requested, a copy of the notice of appeal and a copy of any statement of reasons, written arguments, or other documents on each party within 15 days after filing the document. Proof of service shall be filed with the Board within 15 days after service. Failure to serve may subject the appeal to summary dismissal pursuant to 43 CFR 4.1285.

Sincerely,

A handwritten signature in cursive script that reads "Thomas D. Shope".

Thomas D. Shope
Regional Director

cc: Pittsburgh Field Division
Office of the Solicitor, Pittsburgh